BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

RECEIVED

DEC 15 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Application of BellSouth Corporation,	)	CC Dkt No. 98-121
BellSouth Telecommunications, Inc., and	)	
BellSouth Long Distance, Inc.	)	
Pursuant to Section 271 of the	)	
Communications Act of 1934, as	)	
amended, to Provide In-Region	)	
InterLATA Services to Louisiana	)	

OPPOSITION OF SPRINT COMMUNICATIONS COMPANY L.P. TO BELLSOUTH'S PETITION FOR RECONSIDERATION AND CLARIFICATION

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Dated: December 15, 1998

SUMMARY

BellSouth offers no basis for reconsidering the numerous issues discussed in its petition for reconsideration of the Commission's rejection of BellSouth's second application for Section 271 approval in Louisiana ("Louisiana II Order"). In each case, the FCC has fully considered the relevant facts and legal arguments and reached a reasonable conclusion rooted firmly in the record.

PCS. BellSouth's attempt to resuscitate its argument that PCS providers qualify as "competing providers of telephone exchange service" in Louisiana is fatally flawed. Contrary to BellSouth's argument, the FCC did not use a market share test in the Louisiana II Order, but rather determined that PCS was not part of the relevant market at all. Furthermore, in criticizing the M/A/R/C study of PCS users in New Orleans, the FCC did not, as BellSouth asserts, apply a geographic scope requirement. Rather, the FCC simply determined that New Orleans PCS subscribers were not representative of PCS users statewide. Nor is BellSouth's reliance on PCS second line competition compelling since the FCC correctly concluded that second line competition does not rise to the level of close substitutability for wireline local service.

OSS. BellSouth's argument that average installation intervals should only apply to OSS, and not to the non-OSS aspects of providing checklist items, is also baseless. In many cases, the only functions involved in providing a checklist item are OSS functions. More importantly, the nondiscrimination requirement applies independently to all checklist items for which average installation intervals are relevant.

Section 272. BellSouth incorrectly asserts that the FCC lacks the authority to consider whether a BOC has complied with Section 272's nondiscrimination safeguards before Section 271 approval has been granted. BellSouth's argument has no basis in the statute, and BellSouth's

suggested approach would essentially eliminate the Section 272 compliance requirement from the application process. Moreover, BellSouth is also incorrect that the requirements described in the Louisiana II Order for the submission of information by BOCs to demonstrate compliance with Section 272 have no basis in the Act and are inconsistent with prior FCC decisions. In fact, earlier FCC decisions on this issue established minimal standards to which the FCC has now added. In so doing, the FCC acted well within its statutory authority.

Public Interest. BellSouth's argument that the FCC cannot consider whether a BOC has committed to performance monitoring requirements (performance measures, reporting and self-executing penalties) fares no better. Contrary to BellSouth's argument, mere consideration of such commitments cannot be equated with requiring them in every case. Nor does mere consideration result in any usurpation of the states' primary jurisdiction to arbitrate and enforce interconnection agreements. The FCC proposes only to consider a state's approach to monitoring requirements as one of many factors that relate to whether approval of a Section 271 application is in the pubic interest.

Other Issues. In addition, BellSouth raises numerous objections to the FCC's analysis of its provision of collocation, switching, rebranding, and interim number portability. In the Louisiana II Order and previous FCC orders, the FCC comprehensively reviewed the issues raised by BellSouth's objections, thus obviating any need for reconsideration.

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OPPOSITION OF SPRINT COMMUNICATIONS COMPANY L.P. TO BELLSOUTH'S PETITION FOR RECONSIDERATION AND CLARIFICATION

Sprint Communications Company, L.P. ("Sprint"), by its attorneys, opposes the petition for reconsideration and clarification filed by BellSouth in the above-captioned proceeding.[1]

I. Introduction

For more than two years now, the BOCs have pressed the FCC to provide them with a detailed set of guidelines for meeting the requirements of Section 271. Although the FCC has

[1] Application of BellSouth Corp. et al for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, *Memorandum Opinion and Order* (rel. Oct. 13, 1998) ("Louisiana II Order"). Petitions for reconsideration and/or clarification were filed by BellSouth, AT&T, and Sprint. This opposition addresses only those issues raised by BellSouth's petition ("BellSouth Petition").

attempted to provide such guidance in the past, especially in the Michigan Order,[2] the BOCs have continued to press for more detail. The FCC has been understandably cautious about trying to set forth its understanding of the requirements of Section 271 in too much detail because the issues are highly fact-specific. Nevertheless, in the Louisiana II Order, the FCC attempted to provide the BOCs with yet more specific guidance.

BellSouth has now filed a petition for reconsideration in which virtually every argument presented is plainly meritless. It is of course ironic that a BOC, after urging the FCC to do everything possible to make the Section 271 process more efficient, would file a reconsideration petition full of make-weight arguments. But it is also revealing. The fact is that BellSouth, more than any other BOC, has pursued a strategy of attrition rather than compliance in the Section 271 process. As has been noted in the past, BellSouth has decided to devote its resources to refiling essentially the same deficient application and the same flawed arguments in the hope that the FCC, or Congress, will decide to change the relevant standards. The instant petition is part of a fairly obvious broader political strategy designed to subvert, rather than improve the Section 271 process. It should come as no surprise therefore that BellSouth offers nothing of substance in support of its multiple requests for reconsideration.

II. There is No Basis For Reconsideration of the FCC's PCS Findings.

BellSouth makes three fundamental errors in its Petition with respect to the Louisiana II Order's findings on PCS. First, BellSouth mistakes the Commission's relevant market definition

2 Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, *Memorandum Opinion and Order*, 12 FCC Rcd. 20543 (1997) ("Michigan Order").

analysis of whether PCS providers serve as "competing providers of telephone exchange service" for a supposed effort to measure market share of PCS providers in an assumed relevant market that would include both wireline and PCS services. Second, BellSouth confuses the Commission's assessment of the predictive value of BellSouth's evidence (the M/A/R/C study) with an alleged effort to create a geographic scope requirement. Third, BellSouth unreasonably protests the Commission's correct assessment of the competitive insignificance of PCS substitution for second telephone lines. As explained below, BellSouth has mischaracterized the Louisiana II Order's analysis in each of these respects, and there is no basis for reconsideration of these issues.

The Louisiana II Order did not attempt to set a market share test; rather, it rejected the proposition that PCS today is in the relevant market *at all*. In the language of Section 271(c)(1)(A), PCS firms do not now serve as "competing providers" of local exchange service. In the Louisiana I Order,[3] the Commission ruled that "an applicant must demonstrate that a PCS provider . . . offers service that both satisfies the statutory definition of 'telephone exchange service' in Section 3(47)(A) and competes with the telephone exchange service offered by the applicant in the relevant state." Louisiana I Order ¶ 73. Further, the Commission has appropriately ruled that "there must be an actual commercial alternative to the BOC in order to satisfy Section 271(c)(1)(A)."[4] These established rulings were applied to this proceeding: "We

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3 See Application of BellSouth Corp. et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Louisiana, CC Docket No. 97-231, *Memorandum Opinion and Order*, 13 FCC Rcd. 6245 (1998) ("Louisiana I Order").

4 Application of SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in

believe that the BOC must show that broadband PCS is being used to replace wireline service, not as a supplement to wireline." Louisiana II Order ¶ 31.

BellSouth's initial claim that "Louisiana consumers are in fact substituting PCS for traditional wireline service," BellSouth Br. at 15, was rejected in the Louisiana II Order for a number of reasons -- none of which has to do with a market share test or geographic scope requirement. Rather, the Commission reviewed the record and concluded that the services do not now compete with one another.

The Commission first noted its findings from PCS-specific proceedings where it has concluded that PCS remains to date a complementary service to traditional phone service. Louisiana II Order ¶ 33. In doing so, the Commission relied upon and applied its general experience with and acquired expertise in these industries to reach its conclusion. This is a classic exercise of agency judgment and discretion in which the Commission is owed substantial deference.[5] The Commission next reviewed BellSouth's specific evidence and the broader record to assess that its general conclusion remains correct.

NERA Study. The Commission discounted the NERA study submitted by BellSouth. It is important to note here what BellSouth's expert set out to show. In his reply, Dr. Banerjee stated:

Oklahoma, CC Docket No. 97-121, *Memorandum Opinion and Order,* 12 FCC Rcd. 8685, ¶ 14 (1997) ("Oklahoma Order").

5 See Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221, 1228 (D.C. Cir. 1980) ("[T]he question is whether the FCC made a reasonable selection from the available alternatives. The court does not substitute its judgment for that of the agency . . . ."); National Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1095, 1140 (D.C. Cir. 1984) ("Effective regulation requires that the [FCC] bring to bear the full range of its knowledge, garnered from whatever source, in making the interpretation on which it bases important policy decisions.") (citation omitted).

> The point of my analysis was *not* to establish whether their product and geographic dimensions would argue for classifying wireline and cellular (or PCS) services in the same or different markets.

Banerjee Reply Aff. at 5 (emphasis in original). Thus, from the initial filing of its application, BellSouth attempted to make more of its expert's submission than was supportable or reasonable. But even from the narrower perspective of the study, the record demonstrated substantial difficulties with even the less ambitious conclusions.

BellSouth had initially contended that this study showed that "as many as 7 to 15 percent of BellSouth's local residential customers in New Orleans could consider switching to PCS PrimeCo on price grounds alone." BellSouth Br. at 14. After Sprint's experts analyzed the NERA study, BellSouth retreated from this statement and cut those percentages by nearly half on the basis of only one adjustment (including both incoming and outgoing minutes) noted by Drs. Shapiro and Hayes. See Banerjee Reply Aff. at 16-17. Numerous other flaws were also recorded in the proceeding by Drs. Shapiro and Hayes (and others), leading the Commission to conclude that the study actually revealed that only one-half of one percent of BellSouth's wireline customers would consider substitution on the basis of price. This evidence, along with other factors, prompted the FCC to conclude that PCS services are not viable substitutes for local telephone exchange services.[6]

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6 The one-half of one percent of customers who might consider switching based on price have a very rare and atypical user profile: very low volume customers who nevertheless purchase a large number of vertical services. Dr. Banerjee readily conceded that: "the identifiable customer group of potential switchers most definitely does *not* share the usage profile of the so-called average customer in New Orleans, not even remotely so." Banerjee Aff. at 20 (emphasis in original). Dr. Banerjee nevertheless insisted that this fact was not a problem because, he claimed: "the only relevant quest here is for the size of the group of likely switcher . . . ." Id. Again, BellSouth is able to reach a conclusion it wants by asking the wrong question. The point remains that this group is so small as to be economically insignificant. Shapiro & Hayes at 22-23.

In its reconsideration petition, BellSouth apparently concedes now that this exceptionally low percentage is accurate, but insists that it is sufficient as a matter of law because anything less is a market share test. BellSouth is once again confused. The Commission did not conclude that PCS providers have a 0.5% market share; it concluded that PCS providers have **zero** market share *because they are not in the relevant market at all.*

BellSouth ignored numerous other problems identified in the record and used as part of the Commission's reasoned analysis to exclude PCS firms as "competing providers." For example, none of the price analyses or studies offered by BellSouth takes into account the great disparity in the costs and pricing of the handsets required for PCS on the one hand and POTS on the other hand. Nor did BellSouth take into account the numerous quality differences between PCS and POTS, including signal reliability, signal quality, geographic reach, the absence of number portability and "calling party pays," among other issues. See Sprint Petition to Deny at 16-17, 20-21.

M/A/R/C Study. The Louisiana II Order also correctly discredited the M/A/R/C study for a variety of reasons. The Commission noted the absence of any statistical analysis of the M/A/R/C data. It noted too the ambiguously worded questions of the survey used by the study. Significantly, the Louisiana II Order noted the fundamental failure of the study to ask the simple question of respondents: do you subscribe to wireline service?[7] The Commission further rejected BellSouth's claim that the M/A/R/C study showed that thousands of consumers in Louisiana were

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7 The Louisiana II Order was unduly polite in this respect. As Sprint had shown in the proceeding, this question had in fact been included in the first M/A/R/C survey but no responses were reported for it. It was then dropped from the second survey. BellSouth never responded to Sprint's observation that this omission appeared to be deliberate, leaving the inference that the results were inconvenient to BellSouth's case.

substituting PCS for wireline, on the basis of skewed and insufficient sampling methods used. Noting testimony from a state proceeding in which BellSouth's consultant had admitted that the survey did not necessarily represent the universe of PCS users, the Commission observed that BellSouth had not shown that the New Orleans respondents were representative of PCS users statewide. This observation was by no means any sort of geographic scope test. Rather, the Commission was observing the study's weaknesses in being used *as BellSouth had tried to use it*, that is, to extrapolate generally about consumer attitudes throughout Louisiana. Once again, BellSouth's lawyers' reach exceeded its consultants' grasp.

The Louisiana II Order correctly noted that evidence of actual customer substitution between services at a given price would be the most persuasive evidence. BellSouth now insists that such "evidence" was produced because it claims it was able to find 11 people in New Orleans who do not use wireline service but do use PCS. BellSouth Petition at 3. But Section 271 is not some sort of parlor trick where the mere recitation of words magically wins the game. The point of Track A is to show that the local markets have in fact been opened. The fact that 11 people (and the correct number may not be even 11) may have opted for PCS does not reveal or inform the issue at all. Sprint is indeed willing to stipulate that BellSouth and its consultants likely could have found 11 other people who are willing to step out their back doors and shout rather than use the telephone, but that doesn't mean that BellSouth faces meaningful competition from people with loud voices.[8]

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[8] The Justice Department has also concluded that there is insufficient substitutability between PCS and POTS. See Justice Department Evaluation at 5 n.9; Louisiana I Order ¶ 73; see also Louisiana II Order ¶¶ 35, 40. The Department deferred to the Commission on the question of whether the antitrust concepts of relevant market apply to Section 271. As Sprint has shown, the same economic concepts underlie the required Track A analysis.

Second Line Substitutability. Finally, BellSouth disputes the Louisiana II Order's treatment of the relevance of second line substitution with PCS. The Louisiana II Order correctly observed that such usage is not evidence of opening the local market nor any weakening of the monopoly power enjoyed by BellSouth. As Drs. Shapiro and Hayes explained,

> Second and third lines are a limited segment of the overall local exchange market, accounting for about 13 percent of the 16.2 million residential access lines in BellSouth's region. Because BellSouth would likely retain monopoly power in the overall market even if it faced significant competition for second and third lines, even convincing evidence of competition in this market segment would not be sufficient to conclude that PCS is a close competitor to wireline services.

Shapiro & Hayes at 12 (footnote omitted). And further, as Drs. Shapiro and Hayes observed, "BellSouth has not provided convincing evidence of competition even in this limited segment of the local exchange market." Id. at 12-13.

Thus, BellSouth succeeded in showing no more than the complementarity of PCS and local exchange services. To ignore the actual competitive significance of PCS service as now urged by BellSouth would subvert the very purpose of establishing Track A as the primary avenue for BOC entry into the in-region, interLATA market. The Commission has found that Congress established Track A as the primary avenue for Section 271 review so that BOCs would have the incentive "to cooperate with potential competitors in the provision of access and interconnection and thereby facilitate competition in local exchange markets."[9] Under this rationale, Track A is preferred because consumers benefit from the presence of facilities-based competition. The presence and success of a Track A competitor is also evidence that the barriers to entry have been (at least to some extent) lowered. But the presence of a carrier providing services of only limited

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9 See Oklahoma Order ¶ 46.

substitutability such as PCS offers few of the consumer benefits Track A is designed to deliver, and provides no evidence that the local markets have been opened and that barriers to entry have been removed. Both the plain language and the *purpose* of Track A therefore mandate that only carriers offering true competition in the form of economically meaningful substitute services can qualify as competing providers of local service under Section 271(c)(1)(A).

As aptly summarized by Drs. Shapiro & Hayes:

> The fact that customers use PCS to make local calls does not mean that PCS is a viable commercial substitute for local exchange service. Actual local competition requires that BellSouth lose, or risk losing, customers and minutes-of-use to the PCS networks. The best evidence indicates, on the contrary, that PCS is currently used as a complement to wireline service, not a substitute for it. As a supplement to local exchange service, PCS may generate more minutes of use, and therefore more reliance, on BellSouth's local network, not less.

Shapiro & Hayes at 6. The Commission need not and should not reconsider this issue.

III. BellSouth's Attempt To Limit The Application Of Average Installation Intervals To OSS Functions Is Meritless.

BellSouth asks the FCC to reconsider its policy of reviewing average installation interval data in determining whether a BOC has provided unbundled elements on a nondiscriminatory basis. BellSouth Petition at 6. In considering these data, BellSouth thinks that the FCC has somehow impermissibly extended the requirement that all ILECs provide nondiscriminatory OSS access to functionalities that are not associated with OSS. This confused argument is easily rejected.

First, in many cases, the *only* functions necessary for the provision of a checklist item to a requesting carrier are OSS functions. For example, the provision of resold lines to requesting carriers should generally require no more than preordering and ordering OSS functions. Many repair functions can also be performed entirely through OSS operations. In these situations, it is entirely appropriate for the FCC to rely on performance measures that track only the OSS functions as the basis for determining whether the nondiscrimination test has been met.

It is of course true that there are some aspects of a BOC's role as wholesale supplier of checklist services that are not strictly speaking part of OSS. But the BOCs are required to provide access to *all* unbundled elements as well as interconnection and resale on a nondiscriminatory basis. The provisions of the Section 271(c)(2)(B) competitive checklist as well as the FCC's rules impose this obligation.[10] It is therefore irrelevant that a particular functionality might become subject to the nondiscrimination requirement because it is part of OSS or because it is part of the provision of another unbundled element or the provision of interconnection or resale. All of these functionalities are subject to the same nondiscrimination requirements.

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10 All of the checklist items potentially relevant to average installation intervals impose a nondiscrimination obligation. See 47 U.S.C. § 271(c)(2)(B)(i) (interconnection), (ii) (unbundled elements), (vii) (911, directory assistance), (xiv) resale. Furthermore, the Eighth Circuit's decision in Iowa Utils. Bd. v. FCC left undisturbed the FCC rules requiring ILECs to provide the checklist items relevant to performance measures on terms and conditions equal to those the ILEC provides itself. See 120 F.3d 753, 819 n.39 (8th Cir. 1997) (providing comprehensive list rules overturned by the decision), *cert. granted,* 118 S.Ct. 879 (1998). Thus, existing FCC rules impose an independent federal obligation on BOCs to provide interconnection, unbundled elements, and resale on nondiscriminatory terms and conditions. See 47 C.F.R. § 51.305(a)(3) (interconnection); id. § 51.307(a) (unbundled elements); id. § 51.311(b) (unbundled elements); id. § 51.613(b) (resale). In fact, in the case of unbundled elements, the FCC's rules specifically require performance that is equal in all respects:

> Where applicable, the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself.

Id. § 51.313(b).

What BellSouth appears most concerned about is that it should be allowed exceptions to the nondiscrimination requirement. For example, it is true that a BOC should not be penalized for failing to meet a provisioning deadline where the requesting carrier has asked that the service be completed after the deadline and where the BOC was ready and willing to the meet the deadline. But the FCC has stated repeatedly that a BOC may submit data, along with its Section 271 application, explaining why any failure to meet its nondiscrimination requirement might be justified. See Michigan Order ¶ 170; South Carolina Order[11] ¶ 138. BellSouth has simply failed to provide any basis for justifying its failure to meet the relevant nondiscrimination requirements in Louisiana.

IV. The FCC Did Not Err In Finding That BellSouth Failed To Comply With Section 271(d)(3).

In its petition, BellSouth argues that the Act does not empower the Commission to require BellSouth to comply with Section 272's nondiscrimination safeguards before it has received Section 271 authorization. BellSouth Petition at 15. BellSouth further contends that, even if the Commission were empowered to require such compliance, it erred in the Louisiana II Order by "requir[ing] a level of disclosure . . . that is inconsistent with the disclosure requirements the Commission has already established, and, for that matter, with section 272 itself." Id. Neither argument warrants reconsideration of the Louisiana II Order.

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[11] See Application of BellSouth Corp., et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, *Memorandum Opinion and Order*, 13 FCC Rcd. 539 (1997) ("South Carolina Order").

A. The FCC May Rely On The Past And Present Conduct Between A BOC And Its Long Distance Affiliate In Order To Make Its Section 271(d)(3) Finding.

Section 271(d)(3) states, in pertinent part, that "*[t]he Commission* shall not approve the [Section 271] authorization requested in an application . . . *unless it finds* that . . . the requested authorization *will* be carried out in accordance with the requirements of section 272 . . . . The Commission shall *state the basis* for its approval or denial of the application." 47 U.S.C. § 271(d)(3) (emphasis added). The broad language of Section 271(d)(3) places no restrictions on the evidence that the Commission may consider in determining whether a BOC applicant will comply with the requirements of Section 272. Indeed, prohibiting the Commission from considering an applicant's past and present performance would essentially prevent the Commission from making any finding at all. Under such an interpretation, the BOC would only be required to recite the "magic words" that it would in the future comply with the statute and the Commission's rules. The FCC would be forced to accept this paper promise and look no further. This could allow the BOC interLATA affiliate to unlawfully benefit, on a going-forward basis, from misconduct in the past (*i.e.*, prior to Section 271 authorization).

BellSouth has itself recognized that in at least some instances its "'past and present behavior' . . . may be 'highly relevant' in making predictions about future section 272 compliance . . . ." BellSouth Petition at 15. In an apparent attempt to hedge its bets regarding what the FCC can and cannot rely upon to make its Section 271(d)(3) finding, BellSouth attempts to show past and present compliance with the FCC's rules and the requirements of Section 272. As the Commission found, however, BellSouth failed to demonstrate that it would comply with Section 272's requirements, including subsection (b)(5)'s affiliate transactions requirements. Louisiana II Order ¶ 332. BellSouth's performance in this regard presents an example of the potential for abuse under BellSouth's view of Section 272 compliance. Moreover, as the Justice Department's expert witness Dr. Marius Schwartz has explained, any attempt to remedy these problems after Section 271 approval has been granted is much less likely to be successful than pre-approval enforcement efforts.[12] The only sensible approach therefore is for the Commission to establish compliance standards while the BOC still has the incentive to cooperate.

B. The FCC Merely Clarified Section 272(b)(5)'s Disclosure Requirements.

BellSouth next contends that the Commission impermissibly "impose[d] disclosure requirements that have no basis in the Act and are inconsistent with prior decisions of the Commission." BellSouth Petition at iv. Contrary to BellSouth's allegations, the Commission merely clarified the degree of public disclosure necessary to meet Section 272(b)(5)'s "reduced to writing and available for public inspection . . . " requirement. 47 U.S.C. § 272(b)(5); 47 C.F.R. § 53.203(e).

In its Accounting Safeguards Order, the Commission held that:

> To satisfy section 272(b)(5)'s requirement that transactions between section 272 affiliates and the BOC of which they are an affiliate be "reduced to writing and available for public inspection," we require the separate affiliate, *at a minimum*, to provide a detailed written description of the asset or service transferred and the terms and conditions of the transaction on the Internet . . . . We require that the *description* of the asset or service and the terms and conditions of the transaction *should be sufficiently detailed to allow us to evaluate compliance with our accounting rules.*[13]

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[12] See Supplemental Affidavit of Marius Schwartz on Behalf of U.S. Department of Justice ¶¶ 36-40.

[13] Accounting Safeguards Under the Telecommunications Act of 1996, CC Docket No. 96-150, *Report and Order*, 11 FCC Rcd. 17539, ¶ 122 (1996) ("Accounting Safeguards Order") (emphasis added).

To ensure that such transactions would be conducted "on an arms' length basis," the Commission further modified its rules governing affiliate transactions to require carriers to record *all* transactions that are neither tariffed nor subject to prevailing company prices at the higher (when the carrier is the seller) or lower (when the carrier is the buyer) of (1) (a) net book cost (for assets) or (b) fully distributed cost (for services) and (2) estimated fair market value. See Accounting Safeguards Order ¶ 147.

In its Louisiana II Order, the FCC reiterated and further clarified these disclosure requirements. For example, it indicated that, at a minimum, BellSouth would have to disclose the quantity and (if relevant) quality of any asset being transferred. Louisiana II Order ¶ 337. Similarly, for service transactions, the Commission identified specific information that BellSouth would have to disclose, including "the number and type of personnel assigned to the project, the level of expertise of such personnel, any special equipment used to provide the service, and the length of time required to complete the transaction." Id. In addition, BellSouth would need to provide details regarding hourly rates and whether those rates included other costs, such as costs of materials or overhead. Id. The Commission clearly stated that, without such details, it would be unable to evaluate BellSouth's compliance (or lack thereof) with the Accounting Safeguards Order. Id.

BellSouth seeks reconsideration of these specific disclosure requirements, arguing that the Louisiana II Order requires it to report information not currently required by the FCC's accounting rules. BellSouth Petition at 16-17. BellSouth's analysis ignores several material points.

First, BellSouth inaccurately contends that the Commission's accounting safeguards merely require it to provide a description of the service, its price, and the time period involved.

Id. at 16. The Commission faced a similar argument from Ameritech in its Section 271 application for Michigan; there Ameritech contended that it need not disclose the actual rates of an affiliate transaction to comply with the Accounting Safeguards Order. According to Ameritech, posting a description of the valuation method was sufficient. Michigan Order ¶ 368. The Commission disagreed. Ameritech, like BellSouth here, had "fail[ed] to acknowledge the *Accounting Safeguards Order's* directive that 'the description of the asset or service and the terms and conditions of the transaction should be sufficiently detailed to allow us to evaluate compliance with our accounting rules.'" Id. ¶ 369; see also Accounting Safeguards Order ¶ 122. Thus, to the extent BellSouth reports only three pieces of information, namely, a description of the service, its price, and the time period involved, see BellSouth Petition at 16, BellSouth's system does *not* satisfy this requirement.

Second, BellSouth contends that the Louisiana II Order requires it to report transaction rates based on "units of labor," and that it cannot do so because its systems do not record this type of information. Id. at 16-17. Even if it could report this information, BellSouth argues that it need not because such a requirement would be inconsistent with the Commission's Accounting Safeguards Order, which allows BellSouth to calculate service transactions on a fair market value basis. Id. It is true that in certain, limited circumstances (*i.e.*, where no tariffed rate exists and the product or service has no prevailing company rate), BellSouth *may* use the fair market method to value a given transaction. In those instances, however, the Commission requires the BOC to record its transaction at the higher of cost and fair market value (when the carrier is the seller) or the lower of cost and fair market value (when the carrier is the buyer). Accounting Safeguards Order ¶ 147. The only way to determine whether BellSouth is complying with this rule is to have access to the information underlying BellSouth's cost valuations. This is precisely the type of information required by the Commission in the Louisiana II Order.

Finally, BellSouth concludes that it "cannot report information consistently in its section 271 application, section 272 disclosures, CAM, and ARMIS disclosures, if the Commission establishes one set of rules for section 271 applications, and another set for those other purposes." BellSouth Petition at 17. BellSouth misses the point. There is absolutely no prohibition against the Commission requiring more detailed disclosures for different (and increasingly sensitive) statutory requirements. For example, the degree of disclosure required to distill an ILEC's regulated costs from its unregulated ones in a cost allocation manual does not necessarily bear upon the degree of disclosure required to ensure that a BOC is not favoring an affiliate through below-cost transfers of assets or services.

Indeed, the notion that BellSouth cannot be required to provide differing levels of detail depending upon the statutory requirement at issue (*e.g.*, ARMIS, CAM, Section 272) is completely insupportable. The Commission has *already* expressly recognized that information reported in a BOC's CAM "is *not sufficiently detailed to satisfy section 272(b)* because the BOC's cost allocation manual contains only a general description of the asset or service and *does not describe all of the terms and conditions* of each transaction." Accounting Safeguards Order ¶ 122 (emphasis added). BellSouth can and must report different degrees of information for different purposes. The Louisiana II Order does not exceed, nor is it inconsistent with, the Act's requirements or the Commission's accounting rules.[14] BellSouth's request for reconsideration should be denied as to both arguments.

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14 Disclosure of such information is consistent with the Commission's accounting rules. Even if it were inconsistent, a regulatory agency may modify its rules, when reasonable, to

V. BellSouth's Argument That The FCC May Not Consider Monitoring Commitments Made By BOCs As Part Of the Public Interest Inquiry Must Be Rejected.

BellSouth's attempt to restrict the FCC's discretion in conducting its public interest inquiry is simply a further gloss on arguments the FCC has already rejected. In its Michigan Order, the FCC rejected the argument that the public interest inquiry must be limited to assessing whether BOC entry into the interLATA market would enhance competition in that market. Michigan Order ¶ 386. The FCC instead held that, as part of its public interest inquiry, it would consider certain factors in determining whether the local market in the relevant state is open. For example, the FCC stated that, in the absence of adequate evidence of actual competition, it would consider whether a BOC had agreed to performance measures, reporting and self-executing penalties (for failure to meet performance measure and reporting requirements) in its interconnection agreements. See id. ¶¶ 393-94.

BellSouth argued in its brief in support of the instant application (as it had in its previous applications) that the FCC's "theory" about its authority under the public interest prong was "implausible" and reiterated the argument that the FCC could only consider the public interest effects on the interLATA market in the context of Section 271. BellSouth Br. at 74.[15] The FCC rejected this argument again in the Louisiana II Order and again stated that it would consider

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accommodate changed circumstances. See Helvering v. Reynolds, 313 US 428, 432 (1941) (Prior administrative rule or practice is always subject to change "through exercise by the administrative agency of its continuing rule-making power.")

[15] Missing the irony, BellSouth described as nonbinding "dictum" the FCC's statements in the Michigan Order regarding issues the Commission would consider in determining whether future Section 271 applications are in the public interest. See BellSouth Reply Br. at 101. The irony is, of course, that BellSouth and the other BOCs have pressed the FCC to provide extensive guidance as to the requirements of Section 271. However, when BellSouth disagrees with such guidance, it apparently views it as non-binding.

whether a BOC had agreed to performance measures, reporting and self-executing penalties to determine whether a BOC's local market is and will remain open to competition. See Louisiana II Order ¶¶ 363-64. The Commission emphasized that this evidence was probative but that the presence or absence any such factors "would not dictate the outcome of the public interest inquiry." Id. ¶ 362.

BellSouth has now attempted to mischaracterize the 271 orders as impermissibly adding to the competitive checklist and usurping the states' primary authority over interconnection agreements. BellSouth Petition at 18. Although the FCC stated that it would *consider* whether a BOC has instituted performance measures, reporting and enforcement, BellSouth asserts that such consideration amounts to the FCC *requiring* these commitments as a precondition to approval. But the FCC has clearly stated that the performance monitoring commitments are just some (among many) issues that may be relevant to whether an application is in the public interest. These factors are not requirements that extend the checklist. Nor would the FCC, by simply reviewing the terms of BOC interconnection agreements to determine the level of monitoring commitments, somehow usurp state authority to oversee those agreements.

Properly understood, BellSouth's argument is simply a request that the FCC reverse its decision to consider local competition issues as part of its public interest inquiry. BellSouth has essentially conceded that the FCC could consider monitoring commitments in determining whether a BOC's entry into the interLATA business would be in the public interest. See BellSouth Br. at 107 (citing BellSouth's commitment to "performance measurements" as evidence that interLATA relief is in the public interest). BellSouth knew full well that consideration of performance monitoring in the interLATA context does not extend the checklist or usurp state power. Thus, BellSouth's current objection to the FCC's public interest standard collapses into an argument that the FCC should consider only the interLATA market in the public interest inquiry. Given that the FCC has considered and rejected this theory twice, BellSouth's argument can be rejected summarily.

VI. Other Issues Raised By BellSouth Need Not Be Reconsidered.

In addition to the issues discussed above, BellSouth raises numerous other aspects of the Louisiana II Order for which it seeks reconsideration. The FCC need not waste time on these arguments, since its comprehensive review of the relevant issues in previous orders obviates any further consideration. Moreover, where BellSouth has offered new factual evidence in support of its arguments, that new evidence must be ignored based on the FCC's well-established policy that Section 271 applications must be complete when filed.

Collocation. BellSouth seeks reconsideration of two collocation issues. First, BellSouth claims that the FCC incorrectly concluded that BellSouth offers only collocation as a means of recombining network elements since BellSouth offers to consider other means of recombination through the *bona fide* request ("BFR") process. BellSouth Petition at 9. The legal obligation to provide an adequate means of recombining network elements is based on the checklist requirement that a BOC provide access to unbundled elements in accordance with Section 251(c)(3), which in turn requires ILECs to provide unbundled elements in a manner that allows requesting carriers to combine them. See 47 U.S.C. § 271(c)(2)(B)(ii); id. § 251(c)(3). The FCC has concluded in previous Section 271 orders that, in order to demonstrate that it provides or generally offers a checklist item, a BOC must have a "concrete and specific legal obligation to furnish the item upon request . . . " and "that it is presently [prepared] to furnish each checklist item in the quantities that competitors may reasonably demand and at an acceptable level of quality." See Michigan Order ¶ 110; South Carolina Order ¶ 81. The offer to consider a proposal for recombination through the BFR process falls far short of meeting this standard.

BellSouth's argument that it provides collocation in a reasonable and timely manner, see BellSouth Petition at 9-10, is also easily dismissed. In support of its argument, BellSouth simply repeats the points made in its affidavits. Compare id., with Milner Aff. Exh. 2 and Tipton Reply Aff. ¶ 9. The FCC explicitly considered BellSouth's reliance on an average of actual provisioning times for three physical collocation arrangements in Louisiana and determined this evidence to be insufficient by itself to demonstrate compliance with the checklist. See Louisiana II Order ¶ 72. BellSouth has offered no basis for the FCC to change that conclusion.

Switching. BellSouth's objections to the FCC's conclusion that BellSouth fails to provide access to all vertical switching features and to usage data needed to bill for reciprocal compensation are essentially restatements of the arguments BellSouth made in support of its second Louisiana application. See BellSouth Petition at 10-12.[16] In the case of vertical switching, the FCC appropriately concluded that BellSouth must activate vertical features loaded in the switch (but not used by BellSouth) for CLECs to use. See Louisiana II Order ¶ 217. Similarly, the FCC correctly concluded that BellSouth was unjustifiably refusing to provide billing information for terminating traffic to purchasers of unbundled local switching. See id. ¶ 234. In

16 The vertical features argument as it appears in the BellSouth Petition is almost exactly the same as the version offered in support of the application. Compare BellSouth Petition at 10-11, with Varner Aff. ¶ 125 and BellSouth Reply Br. at 68. The BellSouth Petition includes more factual detail (although the same substantive point) on reciprocal compensation. Compare BellSouth Petition at 11-12, with Varner Aff. ¶ 192 and BellSouth Reply Br. at 80-81. This further detail should have been submitted as part of BellSouth's initial application, and cannot now be considered. See South Carolina Order ¶ 38 (applications must be complete when filed); Michigan Order ¶ 50 (same).

both cases, the FCC's review of BellSouth's arguments in the Louisiana II Order shows that the FCC was well aware of the arguments now restated by BellSouth. Given the absence of any valid reason for reconsidering these decisions in BellSouth's Petition, the FCC's conclusions regarding unbundled switching should remain unchanged.

Rebranding. BellSouth asserts in its Petition (as it did in its application) that it can offer rebranded operator services and directory assistance service only if the requesting carrier purchases a dedicated trunk between each BellSouth end office and the BellSouth operator services and directory assistance platforms. See BellSouth Petition at 13. BellSouth argues that this arrangement is nondiscriminatory because "BellSouth, which also delivers all of its traffic over dedicated trunks from each end office to BellSouth's directory assistance and operator services platforms, uses the same trunking architecture as CLECs." Id. But BellSouth failed to demonstrate in its application or in the instant petition why it is nondiscriminatory to subject new entrants, with limited traffic volumes, to the same dedicated trunking requirement used by a BellSouth. This issue thus need not be reconsidered.

Number Portability. BellSouth's assertion that the FCC lacks the jurisdiction over interim number portability ("INP") pricing is an argument the FCC has fully considered and rejected. In the Telephone Number Portability proceeding, both Ameritech and BellSouth argued that the terms of the Communications Act deny the FCC the authority to regulate the price of INP.[17] The FCC rejected those arguments, concluding instead that Sections 251(b)(2) and 251(e)(2) grant the FCC explicit authority over number portability, including the rates an incumbent may charge for

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[17] See Telephone Number Portability, CC Docket No. 95-116, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8352, ¶ 120 (1996) (summarizing comments of Ameritech and BellSouth) ("LNP Order").

interim number portability. See LNP Order ¶¶ 110-12, 122. BellSouth argues that the Eighth Circuit's decision in Iowa Utils Bd. v. FCC overturns this decision. See BellSouth Petition at 14. But the Eighth Circuit found that the 1996 Act grants the FCC jurisdiction over number portability, notwithstanding the purportedly "local" nature of number portability. See 120 F.3d at 794 & n.10. The issue then is whether the explicit grant recognized by the Eighth Circuit extends to rates charged for INP. As explained, the FCC has considered that question and rejected BellSouth's position. There is no reason to revisit that issue now.

VII. Conclusion

For the foregoing reasons, Sprint opposes reconsideration of the issues raised in the petition filed by BellSouth.

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